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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1099

FRANCO C. ROBINSON,
Petitioner,

versus

STEAMSHIP "ATLANTIC STARLING"
and
ATLANTIC STARLING STEAMSHIP CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT
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TO THE HONORABLES THE CHIEF AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Franco C. Robinson, a merchant seaman, prays that a writ of certiorari issue herein to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, affirming the dismissal of petitioner's claims against the respondents above-named and entered in this cause on December 2, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought, printed in full in Appendix "A" hereof, is reported at 369 F. 2d 69 (1966).

The findings and conclusions of the United States District Court for the Eastern District of Louisiana are printed in full in Appendix "B" hereof.

JURISDICTION

Original jurisdiction vested in the District Court by virtue of Article 3, Section 2, Clause 1 of the Constitution of the United States.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

(1) Is a merchant seaman who threatens a ship's officer with a knife, who refuses to obey the lawful commands of his superiors and who stabs the vessel's captain with a galley knife "equal in disposition and temperament to the average man" of a seaman's calling?

(2) Is the absolute liability of a vessel owner for damages inflicted upon one crewmember by another seaman of substandard disposition and temperament dependent upon whether the victim is the assailant's subordinate or superior?

STATUTES INVOLVED

There are no statutes involved in this matter; the rights and obligations of the parties are governed by the non-statutory general maritime law of the United States.

STATEMENT OF THE CASE

On December 29, 1960, petitioner, the ship's captain, was stabbed in the abdomen by the officers' messman.

Petitioner sued the vessel *in rem* and his employer, the owner, *in personam* to recover damages for an alleged breach of the warranty of seaworthiness.

After trial, the District Court dismissed petitioner's suit and he appealed.

The trial court's dismissal was affirmed by judgment and opinion of the United States Court of Appeals for the Fifth Circuit on December 2, 1966 and petitioner now applies to this Honorable Court for a writ of certiorari to review the action of the Court of Appeals, to the ultimate end that this action will be reversed and the case will be remanded to the District Court for the fixing of petitioner's damages.

REASONS FOR GRANTING THE WRIT

(1) In *Boudoin v. Lykes Bros. Steamship Co., Inc.* (348 U.S. 336, 99 L. Ed. 354, 75 S.Ct. 382; 1955) this Court held that, irrespective of fault or negligence, a vessel owner is liable in damages, if one member of the ship's complement is wilfully injured by another crew-

member whose disposition and temperament are not equal to that of the "ordinary men in the calling."

No guidelines, however, were provided for determining "equality" of disposition and temperament.

In the instant case, the messman who stabbed petitioner had previously threatened the ship's radio operator with a knife, had refused to serve customs officials a meal aboard ship and then stabbed the vessel's captain when the latter attempted to intervene for the steward whose order to serve the meal was flatly disobeyed.

In affirming the holding of the District Court that such a crewmember is "equal in disposition and temperament to the average man in the calling," the Court of Appeals has impliedly disparaged all those who follow the sea.

There is a need for this court to set forth affirmatively some workable standard by which behavior in a shipboard community can be properly appraised.

(2) In *Clevenger v. Star Fish and Oyster Company* (325 F. 2d 397; 1963) the Court of Appeals for the Fifth Circuit correctly held, as a matter of law, that a legally unwarranted attack on one seaman by another seaman using a dangerous weapon *ipso facto* rendered the ship unseaworthy. In the instant case, however, the same Court has apparently predicated its refusal to follow its prior correct holding basically upon the fact that the assailing messman in the instant case was petitioner's subordinate.

It is error to determine liability for breach of the warranty recognized in *Boudoin v. Lykes Bros., supra,* by reference to the employment relationship between the victim and his assailant or the position of either aboard ship. The relationship of employees to one another is pertinent only to negligence liability, based upon principles of *respondeat superior,* which the *Boudoin* decision, *supra,* clearly repudiated as immaterial to a species of liability without fault. The Court of Appeals has prejudicially used an improper criterion in its determination that respondents were not liable for damages in this case. In so doing that Court has placed an unjustified restriction upon the warranty of seaworthiness which this Honorable Court traditionally has zealously guarded against such inroads.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

Samuel C. Gainsburgh
1718 Nat. Bank of Commerce Bldg.
New Orleans, La. 70112
Attorney for Petitioner

Of Counsel:
Kierr and Gainsburgh
New Orleans, Louisiana

CERTIFICATE

I, the undersigned member of the Bar of this Court, hereby certify that I have served upon the respondents herein copies of the attached Petition for a Writ of Certiorari by mailing them to their counsel of record, Frank S. Normann, Esq., 1605 Hibernia Bank Building, New Orleans, Louisiana, postage pre-paid, at New Orleans, Louisiana, this day of February, 1967.

Samuel C. Gainsburgh

APPENDIX "A"

In the United States Court of Appeals
For the Fifth Circuit

No. 23,105

Franco C. Robinson,

Appellant,

versus

SS "Atlantic Starling" etc., et al,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(December 2, 1966)

Before THORNBERRY and COLEMAN, Circuit Judges, and YOUNG, District Judge.

THORNBERRY, Circuit Judge: This is an action by appellant, former captain of the S. S. Atlantic Starling, against the vessel's corporate owner, based upon the Jones Act, 46 U.S.C.A §688, and general maritime law. Appellant's complaint contained counts alleging both negligence and unseaworthiness of the vessel. The district court, sitting without a jury, ruled against appellant in both respects. On this appeal,

appellant complains only of the failure of the court to find the vessel unseaworthy..

The events which gave rise to the present legal action occurred during a voyage which began in Mobile, Alabama, in August, 1960. On December 29, 1960, while the vessel lay anchored in the harbor of Iloilo, Philippine Islands, appellant was stabbed in the abdomen by the officer's messman, Carlos Contreras. Appellant immediately drew a revolver which he carried on his person and fired upon the fleeing Contreras, who jumped overboard and swam ashore.

Concerning the circumstances leading up to the stabbing, the district court found:

> During the voyage libellant [appellant] carried a loaded revolver on his person at all times, cursed the members of the crew frequently, served the crew inedible and inadequate meals, accused the crew of various illegal acts, withheld money from them at various ports, sailed on several occasions, leaving crew members stranded in foreign ports, and had crew members arrested while in port on liberty, all without just cause.
>
> Libellant went so far as to physically abuse members of the crew and longshoremen brought aboard the vessel to work.
>
> Libellant was particularly abusive to the officer's mess man, Carlos Contreras, frequently cursing and abusing him and referring to him as a "dog," "Chilean Red" and

> "Communist dog." He cancelled Contreras' allotment and denied him liberty in port.
>
> * * *
>
> The record is replete with examples of libellant's complete disregard for the rights and safety of the members of the crew and his frequent abuse and berating of the crew members in general, and Carlos Contreras in particular.

The district court felt that the above-enumerated circumstances precipitated the assault by Contreras. Based upon the evidence, the district court also concluded that Contreras was a "quiet, peaceful, efficient seaman . . . . [and] was equal in disposition and seamanship to the ordinary men in the calling."

A vessel owner may be held liable in damages for wilful injuries inflicted upon one member of the ship's crew by another member who is not equal in disposition and temperament to the "ordinary men in the calling." This liability is based upon the concept that the presence of "a seaman with a wicked disposition, a propensity to evil conduct, [and] a savage and vicious nature" renders the vessel unseaworthy. *Boudoin v. Lykes Bros. S. S. Co.*, 1955, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 296; *McConville v. Florida Towing Corp.*, 5th Cir. 1963, 321 F.2d 162; *Jones v. Lykes Bros. S. S. Co.*, 2nd Cir. 1953, 204 F.2d 815, *cert. den.* 346 U.S. 857, 74 S.Ct. 72, 98 L.Ed. 370. Furthermore, the question of whether the assaulting crew member is

"not equal in disposition and temperament to the ordinary men in the calling" is a question of fact. *Clevenger v. Star Fish & Oyster Co.*, 5th Cir. 1963, 325 F.2d 397, 402.

Appellant, however, relying upon *Clevenger v. Star Fish & Oyster Co., supra,* asserts that this Court should hold that as a matter of law the presence of Contreras rendered the *S. S. Atlantic Starling* unseaworthy. This we decline to do. The evidence in the record clearly substantiates the findings of the district court concerning the temperament of Contreras. This is particularly true since the judicial standard for a seaman's shipboard conduct is more liberal than that required of the ordinary man ashore. See *Walters v. Moore-McCormick Lines, Inc.*, 2nd Cir. 1962, 309 F.2d 191, 193; *Boorus v. West Coast Trans-Oceanic S.S. Line*, 9th Cir. 1962, 299 F.2d 863; *Jones v. Lykes Bros. S.S. Co., supra.* It is furthermore apparent from the evidence that appellant was, to a large degree, responsible for his own injury.

The holding of this Court in the *Clevenger* case in no way dictates a contrary result. The decision in that case was predicated upon the fact that the district court had applied erroneous criteria in deciding the unseaworthiness issue. Furthermore, the assault there involved was of a much more shocking nature. In that case, the libellant, Clevenger, was on deck unloading the vessel's catch. Whitaker, the first mate, was in the hold below. There was a delay in the unloading operation and the two men "exchanged seamen's unpleasantries . . . . Then, without a word of warning, Whitaker climbed a ladder to the deck at a time when Clevenger was facing the other way and

drove a 'devil's fork' deep into Clevenger's back." 325 F.2d at 398. Unlike the present case, there was no evidence of prior provocation by the libellant. Also, it is evident that the Court in *Clevenger* was influenced by the fact that the attacker was the libellant's superior and was in a position of responsibility on the ship.

Clearly, the holding of *Clevenger* is not dispositive of the present case. We feel that the district court correctly decided the entire matter and we therefore

AFFIRM.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 2, 1966

Issued as Mandate: Dec. 29, 1966

APPENDIX "B"

Filed: Jul. 30, 1965

United States District Court
Eastern District of Louisiana
New Orleans Division

Franco C. Robinson,

Libellant,

versus No. 5000 Admiralty

S/S "Atlantic Starling", her engines, boilers, etc., and Atlantic Starling Steamship Corporation,

Respondents.

CHRISTENBERRY, J.

This cause came on for trial before the Court. Having heard the evidence and argument of proctors and having taken time to consider, after considering the evidence and the arguments and briefs of proctors, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACTS

1.

Franco Robinson, libellant, a citizen of Colombia, South America, was master of the vessel, the S/S ATLANTIC STARLING, on or about December 29, 1960, having assumed his duties in said capacity on July 22, 1960, in the port of Mobile, Alabama.

2.

During the entire time of libellant's employment, as hereinabove set forth, the S/S ATLANTIC STARLING was owned and operated by respondent, Atlantic Starling Steamship Corporation, and was used for the carriage of merchandise and goods for hire between various ports of the United States and foreign countries.

3.

The S/S ATLANTIC STARLING left the port of Mobile, Alabama, in August of 1960 with libellant as master, and proceeded through the Panama Canal Zone to San Pedro, California, and then visited in order the following ports: Koahsuing, Formosa; Yokahama, Japan; Appiri, Philippine Islands; Osaka, Japan; Nagoya, Japan; and Iloilo, Philippine Islands. The vessel arrived in Iloilo harbor on the evening of December 28, 1960.

4.

During the voyage libellant carried a loaded revolver on his person at all times, cursed the members of the crew frequently, served the crew inedible and inadequate meals, accused the crew of various illegal acts, withheld money from them at various ports, sailed on several occasions, leaving crew members stranded in foreign ports, and had crew members arrested while in port on liberty, all without just cause.

5.

Libellant went so far as to physically abuse members of the crew and longshoremen brought aboard the vessel to work.

6.

Libellant was particularly abusive to the officer's mess man, Carlos Contreras, frequently cursing and abusing him and referring to him as a "dog", "Chilean Red" and "Communist dog". He cancelled Contreras' allotment and denied him liberty in port.

7.

These acts of provocation and cruel and inhuman treatment continued during the entire voyage, culminating in an altercation between libellant and Carlos Contreras in Iloilo Harbor on December 29, 1960, during the course of which libellant was stabbed.

8.

Following the stabbing, libellant pulled the revolver which he had under his shirt and commenced firing at Contreras, pursuing him to the side of the vessel and firing shots at Contreras as he swam helplessly in the water below.

9.

Contreras was a quiet, peaceful, efficient seaman, who performed his duties in a competent manner

without hesitation or complaint until the goading of libellant's mistreatment caused him to understandably rebel.

10.

The record is replete with examples of libellant's complete disregard for the rights and safety of the members of the crew and his frequent abuse and berating of the crew members in general, and Carlos Contreras in particular.

CONCLUSIONS OF LAW

I.

This court has jurisdiction of the parties and the subject matter.

II.

Carlos Contreras was a seaman equal in disposition and seamanship to the ordinary men in the calling.

III.

The presence of Carlos Contreras as a member of the crew of the S/S ATLANTIC STARLING did not render the vessel unseaworthy.

IV.

The action under the Jones Act cannot be maintained since there is no showing of any negligence on

the part of the respondents, for which they can be held liable.

V.

Libellant having failed to carry the burden of proof to show the vessel was unseaworthy, and upon finding that libellant's injuries resulted solely and only from his own misconduct, the respondents are entitled to a decree dismissing the Libel at libellant's costs.

New Orleans, Louisiana, July 30, 1965.

(Signed) HERBERT W. CHRISTENBERRY
UNITED STATES
DISTRICT JUDGE

(SEAL)
CLERK'S OFFICE:
A TRUE COPY

(Signed) M. M. KNOKER
Deputy Clerk, United States District Court
Eastern District of Louisiana
New Orleans, La.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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SUPREME COURT OF THE UNITED STATES

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FRANCO C. ROBINSON,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The following brief is submitted by respondents, the S/S "ATLANTIC STARLING" and the Atlantic Starl-

ing Steamship Corporation in opposition to the application for writ of certiorari filed by petitioner, Franco C. Robinson.

QUESTIONS PRESENTED.

Respondents submit that the "Questions Presented" by petitioner are improper in that they contain factual allegations not proven by the evidence and omit vital facts found by the District Court and which form the basis of the judgment in the District Court, which was affirmed by the Court of Appeals for the Fifth Circuit. Specifically, the record is devoid of any factual evidence that the seaman referred to (Carlos Contreras) ever threatened to stab a fellow crew member or refused to obey a lawful command of his superiors.

The only question presented by the case is a *factual* question, not a legal one, and is presented by respondents as follows:

1) Was Carlos Contreras a seaman equal in disposition and seamanship to the ordinary men in the calling or did his presence as a member of the crew of the S/S "ATLANTIC STARLING" render the vessel unseaworthy?

STATEMENT OF THE CASE.

The statement of the case furnished by petitioner is likewise inadequate in that it does not contain "the facts material to the consideration of the questions

presented", as required by Rule 23, Section 1 (e) of the U.S. Supreme Court Rules. Respondents, therefore, present the following statement of facts:

On December 29, 1960, petitioner, master of the vessel, the S/S "ATLANTIC STARLING" was stabbed by the officers' mess man, Carlos Contreras, as a result of an altercation between petitioner and said Carlos Contreras.

Petitioner sued the vessel *in rem* and his employer, the owner, *in personam,* to recover damages for an alleged breach of the warranty of seaworthiness, alleging that the presence of said Carlos Contreras rendered the vessel unseaworthy.

The facts leading to the altercation between petitioner and Carlos Contreras are succinctly stated by the Trial Court in its Findings of Fact (Appendix B, pp. 13-15 of petitioner's brief), which findings are fully supported by the evidence.

> During the voyage libellant carried a loaded revolver on his person at all times, cursed the members of the crew frequently, served the crew inedible and inadequate meals, accused the crew of various illegal acts, withheld money from them at various ports, sailed on several occasions, leaving crew members stranded in foreign ports, and had crew members arrested while in port on liberty, all without just cause.

Libellant went so far as to physically abuse members of the crew and longshoremen brought aboard the vessel to work.

Libellant was particularly abusive to the officer's mess man, Carlos Contreras, frequently cursing and abusing him and referring to him as a "dog", "Chilean Red" and "Communist dog". He cancelled Contreras' allotment and denied him liberty in port.

These acts of provocation and cruel and inhuman treatment continued during the entire voyage, culminating in an altercation between libellant and Carlos Contreras in Iloilo Harbor on December 29, 1960, during the course of which libellant was stabbed.

Following the stabbing, libellant pulled the revolver which he had under his shirt and commenced firing at Contreras, pursuing him to the side of the vessel and firing shots at Contreras as he swam helplessly in the water below.

The record is replete with examples of libellant's complete disregard for the rights and safety of the members of the crew and his frequent abuse and berating of the crew members in general, and Carlos Contreras in particular.

The trial court further found that

Contreras was a quiet, peaceful, efficient seaman, who performed his duties in a competent manner without hesitation or complaint until the goading of libellant's mistreatment caused him to understandably rebel.

Based upon the foregoing factual findings, the trial judge dismissed petitioner's suit. The Court of Appeals affirmed, holding that "the evidence in the record clearly substantiated the findings of the district court concerning the temperament of Contreras." (Appendix A, p. 10 of petitioner's brief.)

ARGUMENT.

The only question presented to the Court is a factual question. It is axiomatic that, ordinarily, this Court will not review the concurrent findings of fact of two courts below. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455 (1944). No reason has been given nor authority cited by petitioner why an exception to this rule should be made in the instant case.

The evidence introduced by respondents showed the following concerning the characteristics and disposition of Carlos Contreras, the man whose presence, petitioner contends, rendered the vessel unseaworthy:

According to Charles John Van Trier, Chief Officer on the S/S "ATLANTIC STARLING", Contreras was a conservative, quiet man, a lover of music. (Dep. Van Trier, Respondents' Exhibit No. 7, pp. 13-14.) "He was a good man, conscientious about his work;

he was well liked among the officers." (Respondents' Exhibit No. 7, p. 14.)

George W. Books, third engineer on the S/S "ATLANTIC STARLING" gave the following description of Contreras (Dep. Books, Respondents' Exhibit No. 4, p. 3):

> "He was a very good waiter because he served all of us at any time we wanted something, he would come around to see what we wanted and it was served as we asked."

p. 4:

> "He was a very congenial person. He could mingle very easily."

Rudolph Sargent, oiler in the engine room aboard the S/S "ATLANTIC STARLING", described Contreras as follows (Dep. Sargent, Respondents' Exhibit No. 6, p. 21):

> "To my opinion one of the best persons you could meet, one of the quietest persons you could meet."

Petitioner, on the other hand, was likened by the Chief Officer, Van Trier, to a veritable "Captain Bligh" (Respondents' Exhibit No. 7, p. 15) who constantly abused the officers and crew members serving aboard the vessel.

Petitioner's only evidence in support of his charge that Contreras was not equal in "temperament and disposition to the ordinary men in the calling" was a forged log entry (attached to Van Trier's deposition, Respondents' Exhibit No. 7) and purportedly signed by Van Trier showing that Contreras had threatened the radio operator. Van Trier denied being present at the time of the alleged occurrence (Respondents' Exhibit No. 7, p. 20) and denied having signed the entry.

The foregoing pertinent portions of the testimony show beyond doubt that the holding of the trial judge to the effect that "Carlos Contreras was a seaman equal in disposition and seamanship to the ordinary men in the calling" was eminently correct.

The second one of petitioners presented questions[1] is equally without merit, as it presupposes that Contreras was "of substandard disposition and temperament", which is not proven by the record. Furthermore, the Court of Appeals did not base its holding in the instant case on the fact that the injured party was a superior rather than a subordinate, as had been the case in *Clevenger v. Star Fish & Oyster Co.*, 325 F. 2d 397 (5th Cir., 1963). Petitioner relied upon the *Clevenger* case, *supra,* in his brief and argument before the Court of Appeals, and said court correctly stated that "the holding of *Clevenger* is not disposi-

[1] "Is the absolute liability of a vessel owner for damages inflicted upon one crewmember by another seaman of substandard disposition and temperament dependent upon whether the victim is the assailant's subordinate or superior?"

tive of the present case" for the reason, inter alia, that in the *Clevenger* case, "unlike the present case, there was no evidence of prior provocation by the libellant." (Appendix A, p. 11 of petitioner's brief.)

Although the opinion of the Court of Appeals in the instant case was not based on the fact that petitioner was the captain of the vessel, the Court did consider his status in distinguishing the fact situation from that in *Clevenger*. Respondents submit that such a distinction is valid for the reason that petitioner as master of the vessel is the managing agent of the owner and endowed with complete authority to confine or discharge a seaman whom he believes to be not equal in disposition and seamanship to the ordinary men in the calling. Consequently, it is obvious that either petitioner breached his obligation to the owner by not confining Contreras or, more likely, petitioner did not consider Contreras to be of dangerous propensities thus warranting confinement. In any event, the evidence completely refutes the charge that Contreras was "of substandard temperament and disposition" and that his presence rendered the vessel unseaworthy.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

.....

FRANK S. NORMANN,
1605 Hibernia Bank Bldg.,
New Orleans, Louisiana,
Attorney for Respondents.

CERTIFICATE.

I, the undersigned member of the Bar of this Court, hereby certify that I have served a copy of the foregoing brief upon petitioner by mailing same to his counsel of record, Samuel C. Gainsburgh, Esq., 1718 National Bank of Commerce Building, New Orleans, Louisiana, postage prepaid, at New Orleans, Louisiana, this ... day of March, 1967.

.....

FRANK S. NORMANN.